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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

Arizona Corporation Commission

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AZ CORP COMMISSION
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WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

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IN THE MATTER OF QWEST CORPORATION'S
COMPLIANCE WITH SECTION 252(e) OF THE
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. RT-00000F-02-0271

BY THE COMMISSION:

On December 3, 2002, RUCO filed a Motion to Compel in the above-captioned matter. In its data requests RUCO sought the names of the attorneys and other information, which Qwest had refused to answer based on attorney client privilege. RUCO argues that a prima facie showing of fraud on the part of the client defeats the attorney client privilege. RUCO claims that it has met its burden of establishing a prima facie case of fraud in its filing of August 29, 2002, in which it outlines an alleged scheme between Qwest, Eschelon and McLeod to deceive the Commission and the public.

On December 12, 2002, Qwest filed an Opposition to RUCO's Motion to Compel. Qwest argues that RUCO has not presented evidence to support the required elements of fraud and has not shown that Qwest attorneys undertook representation of the company for the express purpose of defrauding the Commission and the public.

By Procedural Order dated December 4, 2002, the Motion to Compel was set for oral argument on December 13, 2002. At the December 13, 2002 Procedural Conference, Qwest agreed to supplement its responses to RUCO's Motion to Compel, and the parties agreed that following supplementation they would contact the Administrative Law Judge if a discovery dispute remained.

On December 18 and 19, 2002, Qwest and RUCO contacted the Administrative Law Judge to request a Procedural Conference to address the remaining dispute concerning the "fraud exception" to the attorney client privilege.

RUCO filed a Reply to Qwest's Response to Motion to Compel on December 19, 2002.

Qwest submitted supplemental authority on December 27, 2002.

1 Pursuant to Procedural Order dated December 20, 2002, a Procedural Conference convened
2 on December 30, 2002, for the purpose of addressing the issue of the fraud/crime exception to the
3 attorney-client privilege.

4 RUCO alleged in its August 29, 2002 Report that Qwest, along with Eschelon and McLeod,
5 participated in a scheme to discriminate against other CLECs and undermine competition. RUCO
6 argues that in order to understand why Qwest did not file the agreements as required under Section
7 252 of the Telecommunications Act, the Commission must know why Qwest's attorneys permitted
8 such a scheme to take place. RUCO is seeking disclosure of communications between Qwest
9 attorneys and Qwest employees which normally would be protected by the attorney-client privilege.
10 RUCO argues that the crime/fraud exception to the attorney client privilege makes such otherwise
11 protected communications subject to disclosure. RUCO states it wants the information to: 1) find out
12 what happened; and 2) to make sure there are processes in place to prevent such occurrences in the
13 future.

14 Qwest argues that under the law, to pierce the attorney client privilege RUCO must make: 1) a
15 prima facie showing of the nine elements of fraud; and 2) a prima facie showing that the attorney was
16 retained to promote the fraudulent conduct. Qwest argues that neither the facts alleged in RUCO's
17 August 29, 2002, Report, nor the findings in the Minnesota Commission's Order are enough to
18 support either prong of the test, much less both, which is necessary to defeat the privilege.

19 The purpose of the attorney-client privilege is "to encourage full and frank communication
20 between attorneys and their clients and thereby promote broader public interests in the observance of
21 law and administration of justice." Medical Laboratory Mgmt. Consultants v. American
22 Broadcasting Co., 30 F. Supp.2d 1182, 1205 (D. Ariz. 1998). The Medial Laboratory case (citing
23 Laser Industries) sets forth the showing necessary to overcome the privilege pursuant to the
24 fraud/crime exception: "[f]irst, 'the challenger must present evidence which, if believed by the jury
25 would establish the elements of [the alleged crime or fraud]'", and second, "the movant must make 'a
26 prima facie showing that the attorney was retained in order to promote intended or continuing
27 criminal or fraudulent activity.'" In Laser Industrial, Ltd., v. Reliant Technologies, 167 F.R.D. 417,
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1 441 (N.D. Calif. 1996), the Court held that in a civil case, the judge must “deny a motion to penetrate
2 the attorney-client privilege under the crime/fraud exception if, after considering all the evidence and
3 argument offered by both the challenger and the party who is invoking the privilege, the judge cannot
4 say that it is more likely than not that the party resisting the disclosures sought or used legal advice to
5 commit or to try to commit a crime or fraud.”

6 The Arizona Court of Appeals, in State v. Fodor, 179 Ariz. 442, 450 (Ct App. 1994),
7 acknowledged the importance of both prongs of the inquiry, finding that the second prong (a prima
8 facie showing that the attorney was retained for the express purpose of promoting the fraud) is
9 essential to overcoming the privilege. Because of the importance of the privilege, courts must
10 proceed cautiously in piercing the privilege, especially during the discovery phase of the proceeding.
11 See Laser 167 F.R.D. at 423-424 (N.D. Calif. 1996).

12 In its written Motion and Reply, RUCO argues that it has established a prima facie case for
13 fraud, or a fraudulent scheme, in its August 2002 Report. RUCO specifically cites to emails and
14 letters either to or from Qwest attorneys from McLeod or Eschelon attorneys. In addition, at the
15 December 30, 2002, oral argument RUCO referred for the first time to Qwest’s alleged violation of a
16 criminal statute, A.R.S. §13-2311, as a basis for piercing the privilege.¹ Further, at the December 30,
17 2002 Procedural Conference, RUCO attempts to demonstrate that it has established a prima facie case
18 for the nine elements of fraud. See pages 8-10 of the transcript for the December 30, 2002 Oral
19 Argument.

20 In this case, RUCO has not met its burden to present evidence to establish a prima facie case
21 of fraud. RUCO relies on its August 28, 2002 Report to support its claim of Qwest’s participation in
22 a “fraudulent scheme,” but the existence of a couple emails and/or letters cited in the August Report
23 is not sufficient evidence to make a prima facie case for fraud. Based on the entirety of the record to
24 date, the evidence relied upon in RUCO’s Report is not sufficient to support its challenge to the
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26 ¹ A.R.S. §13-2311 provides: “Notwithstanding any provision of the law to the contrary, in any matter related to the
27 business conducted by any department or agency of this state or any political subdivision thereof, any person who,
28 pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any
trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains false,
fictitious or fraudulent statement or entry is guilty of a class 5 felony.”

1 privilege. However, this Procedural Order says nothing about whether RUCO will be able to make a
2 case for fraud at the hearing.

3 RUCO also relies on the Minnesota Commission's findings that Qwest violated federal and
4 state law by not filing the agreements. The Minnesota Commission found that Qwest willfully failed
5 to file the agreements. The Minnesota Commission did not make a finding of a fraudulent scheme.
6 The existence of the findings of the Minnesota Commission may be prima facie evidence that Qwest
7 intentionally failed to file certain documents that it should have, but it is too great a leap to infer a
8 fraudulent scheme based on the Minnesota findings.

9 RUCO argues that really it is not trying to prove fraud, but fraudulent scheme. See Transcript
10 of December 30, 2002 Oral Argument at page 48. For the elements of "fraudulent scheme" RUCO
11 evidently looks to A.R.S. §13-2311. RUCO cited A.R.S. §13-2311 of the first time at the December
12 30, 2002 oral argument, but did not present sufficient information about this statute to allow a
13 determination of its relevance in this Commission proceeding. At this time, we cannot say it is more
14 likely than not that Qwest used legal advice to violate A.R.S. §13-2311, nor can we determine this
15 Commission's jurisdiction over such claim.

16 The second prong of the inquiry is whether RUCO has made a prima facie case that Qwest
17 retained or sought the advice of its lawyers to perpetuate the fraud. RUCO has not cited any evidence
18 that such is the case.

19 RUCO has access to voluminous discovery, and has made use of that discovery as evidenced
20 by its August 2002 Report. Qwest has agreed to make its attorneys and non-attorney employees
21 involved in the relevant transactions available for deposition, and to allow RUCO to ask questions
22 about negotiations with third parties and other non-privileged communications. Thus, RUCO is not
23 being prevented from preparing its case. However, it must do so at this time, without access to
24 privileged communications.

25 Although RUCO has not met its burden at this time, we are not by this finding precluding
26 RUCO from attempting to make a stronger showing at the hearing. As the Laser court recognized, "a
27 determination about whether to pierce a privilege under the crime/fraud exception that is made during
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1 the discovery stage of litigation does not represent the challenger's only or last opportunity to mount
2 evidence on this issue, the challenger can try again during the trial—and at that stage, the challenger
3 may be able to present additional evidence to support the inference.” 167 F.R.D. at 435.

4 Finally, RUCO states that because it wants its expert to be present at the depositions of
5 Qwest employees, and for the convenience of its expert, it wants the Commission to require Qwest to
6 bring those employees to Arizona for deposition. RUCO cites Rogers v Fenton, 115 Ariz. 217, 564
7 P.2d 906 (Ct. App. 1977) for the proposition that because the deponents are corporate employees they
8 should be required to come to the place of the hearing for deposition. We do not find RUCO's
9 situation persuasive, and decline to grant RUCO's request.

10 IT IS THEREFORE ORDERED that RUCO's Motion to Compel communications between
11 Qwest attorneys and Qwest employees that are protected by the attorney client privilege is denied.

12 IT IS FURTHER ORDERED that RUCO's request to order Qwest employees for whom it has
13 issued notices of deposition to appear in Arizona for the purpose of deposition is denied.

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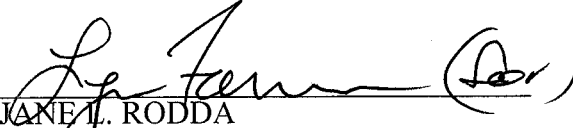
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IT IS FURTHER ORDERED that the procedural schedule established in the November 7, 2002 Procedural Order is modified as follows:

Intervenor testimony	January 21, 2003
Staff testimony/ Intervenor Response to other Intervenor testimony	February 7, 2003
Qwest rebuttal testimony	February 21, 2003
Pre-hearing conference	February 26, 2003 at 10:00 a.m.
Hearing ²	March 3, 2003 at 10:00 a.m.

IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 3 day of January, 2003.


JANE L. RODDA
ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered this 3 day of January, 2003, to

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² The hearing and pre-hearing conference will commence at 10:00 a.m. at the Commission's offices, 1200 W. Washington, Phoenix, Arizona.

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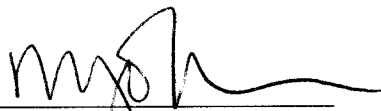
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Molly Johnson
Secretary to Jane Rodda

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